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No. 88-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BROOKSIDE VENEERS, LTD.,
Petitioner,

– v. –

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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September 5, 1988

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QUESTIONS PRESENTED FOR REVIEW

[1] Whether a federal court of appeals panel is required by the doctrine of stare decisis to follow a precedent regarding a rule of statutory construction established by its predecessor court sitting en banc in the absence of legislative change or the showing of clear error.

[2] Whether a federal court of appeals panel may rule that findings of fact of a federal trial court are clearly erroneous without examining the evidentiary record upon which the findings are based.

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Federal Circuit were Brookside Veneers, Ltd. and the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 88-

BROOKSIDE VENEERS, LTD.,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, Brookside Veneers, Ltd., respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Federal Circuit, entered on May 11, 1988, which reversed the judgment

of the United States Court of International Trade in favor of petitioner.

OPINIONS BELOW

The opinion of the Court of Appeal for the Federal Circuit is reported at Fed. Cir. (T)_____(Appeal No. 87-1379, May 11, 1988), 846 F.2d_____(Fed. Cir. 1988)(Appendix A at 1a). The opinion of the Court of International Trade is reported at 10 CIT____(1986)(Appendix B at 30a). The order of the Court of International Trade denying respondent's motion for a rehearing is reported at 11 CIT_____(1987), 661 F.Supp. 620 (Ct. Int'l Trade 1987)(Appendix B at 54a)

JURISDICTION

On December 30, 1986, the Court of International Trade entered judgment in favor of petitioner in its action which was brought under 28 U.S.C. Section 1581(a). Upon denial of its motion for rehearing, respondent appealed to the Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. Section 1295(a)(5). The Court of Appeals for the Federal Circuit entered judgement for the respondent, reversing the judgment of the Court of International Trade, on May 11, 1988. Brookside's petition for rehearing was denied by the Court of Appeals for the Federal Circuit on June 9, 1988. This petition was filed within ninety days thereafter. This Court has jurisdiction to review the judgment of the Court of Appeals for the Federal

Circuit under 28 U.S.C. Section 1254(1).

RELEVANT STATUTES

The statutes relevant to this case, certain provisions of the Tariff Schedules of the United States, 19 U.S.C. Section1202, [hereinafter cited as T.S.U.S.] are reprinted in Appendix C at 62a).

STATEMENT OF THE CASE

This action arose as a consequence of the importation by Brookside Veneers, Ltd. of certain wood products invoiced as manmade and/or recomposed veneer and marketed as wood veneer under the brand name Brookline Veneer [hereinafter referred to as Brookline].

The United States Customs Service at the port of New York classified the imports as articles of wood, not specially provided for, under item 207.00, TSUS. Duty was assessed at the applicable rates of 8%, 7.6% and 7.3% ad valorem, depending on the dates of entry (1979, 1980 and 1981).

Petitioner filed protests pursuant to 19 U.S.C. Section 1514 against the classification utilized by Customs. Brookside claimed that the merchandise

should be classified as wood veneers under item 240.03, TSUS and assessed with duty at the rate of 2% ad valorem or entered free of duty, depending on the date of entry.

Proceedings in the United States Court of International Trade

Upon the denial of the protests by the Customs Service, the petitioner brought suit against the United States in the Court of International Trade, under 28 U.S.C. Section 1581(a), challenging the classification. The matter was submitted for decision on the basis of a Stipulation of Facts in Lieu of Trial which involved the admission into the evidentiary record of a number of documentary and physical exhibits including several documents reflecting treatment of the imported merchandise, Brookline veneer, in trade publications. Brookline veneer is sliced

from a wood block [hereinafter Brookline block] which is composed of wood veneer sliced from a block of natural wood and dyed, glued, and cold pressed together; (App. at 32a). In those trade publications, the Brookline block is referenced variously as a new log, a flitch, a recomposed flitch, and a square log.

Petitioner claimed, among other things, that the Brookline block is describable as a log or a flitch made by artificial means and encompassed by the terms log and flitch in the statutory definition of wood veneer in Schedule 2, Part 3 headnote 1(a), TSUS [hereinafter headnote 1(a)], and cited, as authority for the principle that an unqualified tariff provision for an article includes such named article made by artificial means, the case of Joseph Weiss

Co., Inc. v. United States, 31 Cust. Ct. 17, C.D. 1539 (1953). which cited Larzelere & Co. v. United States, 8 Ct. Cust. Appls. 64, T.D. 37198 (1917).

The Court of International Trade phrased the issue relating to that claim as

> whether such logs or flitches must exist in their natural state.(App. at 38a)

and also explained that

> [t]he issue is whether the block from which Brookline veneers are sliced, in its artificial state, can be treated as a log or flitch consonant with the statutory definition of wood veneers.(App. at 43a).

Applying the rule settled by Larzelere & Co., the Court of International Trade held that the logs and flitches encompassed by headnote 1(a) need not exist in a natural state, i.e., that the terms cover artificial logs and artificial flitches.(App. at 49a). It also held that

the Brookline block, in the context involved, is a log or flitch made by artificial means, and that therefore Brookline veneer, consisting of wood sheets produced by the slicing of logs or flitches, is properly classifiable as wood veneer.(App. at 50a).

In denying respondent's motion for a rehearing, the Court of International Trade expressed the further view that the Brookline block could even be characterized as a natural log or flitch, since

> the placing together of veneers or other types of flitches to secure a certain pattern, the gluing, and sometimes dyeing, by the plaintiff did not transform the resulting logs or flitches from their basic raw state. They are still logs or flitches.(App. at 58a).

Proceedings in the Court of Appeals for the Federal Circuit

Respondent appealed the decision of the Court of International Trade to the Court of Appeals for the Federal Circuit, which reversed the decision, holding that the Brookline block is neither a log nor a flitch, and that Brookline veneer is not veneer for tariff purposes.

The record on appeal to the Federal Circuit herein consists of the original papers and exhibits filed in the Court of International Trade, and a certified copy of the docket entries prepared by the clerk of the Court of International Trade. Fed. Cir. R.11(a)(1) and FRAP 10(a). Pursuant to Fed. Cir. R.11(a)(4) and FRAP 11(e), the Court of International Trade forwarded a certified copy of the docket entries in lieu of the entire record and retained the record.

Pursuant to Fed. Cir. R.12 and FRAP 12, the respondent prepared and filed an appendix with its brief which included the Stipulation of Facts in Lieu of Trial but did not include any of the exhibits filed therewith, consisting, among other things, of some wood veneer samples, including Brookline veneer, and various reprints from trade publications of articles discussing Brookline veneer, its production from the Brookline block, its properties and its use.

Neither party moved for, nor did the Federal Circuit order sua sponte pursuant to Fed. Cir. R.11 (a)(4), transmittal by the Court of International Trade of any part of the evidentiary record. Thus, such findings of fact determined by the Federal Circuit to have been made by the Court of International Trade, and addressed, were

held to be clearly erroneous without the Federal Circuit having examined or reviewed the complete evidentiary record upon which they may be presumed to have been based by the trial court.

While the Federal Circuit alluded to petitioner's claim regarding the scope of the terms logs and flitches in headnote 1(a) being such as to include articles made by artificial means, stating that

> Brookside urges us to interpret log and flitch to include artificial logs and flitches. (App. at 12a),

its opinion does not reflect an understanding that the Court of International Trade had predicated its classification decision on holdings (1) that the logs and flitches involved include, as a matter of law, logs and flitches made by artificial means, and (2)

that the Brookline block is, as a matter of fact, such an artificial log or flitch.

Rather, the Federal Circuit concluded, in error, that the trial

> court found that log or flitch reasonably included Brookside's manmade block because the latter possesses an "essential resemblance" to logs as referred to in headnote 1(a).(App. at 8a).

The Federal Circuit also assigned to petitioner a contention that it had not made, in stating that

> Brookside's contention that logs and flitches can reasonably be read to include the manmade blocks which it produces because these blocks bear an "essential resemblance" to natural logs and flitches is misplaced.(App. at 26a).

Making no further reference to the petitioner's claim and the trial court's findings that Brookline veneer is dutiable as veneer as defined in headnote 1(a)

because it consists of wood sheets sliced from a log or flitch made by artificial means, or to the principle/rule laid down in Larzalere & Co., the Federal Circuit stated that the factual findings concerning "essential resemblance" which it attributed to the Court of International Trade were "clearly erroneous."(App. at 25a,26a).

Petitioner's timely filed petition for rehearing, in which the foregoing perceived procedural and other errors of the Federal Circuit were pointed out, was denied, without comment, on June 9, 1988.(App. at 64a).

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit Failed To Follow Binding Precedent When It Held That The Terms Log And Flitch In Headnote 1(a) Are Limited To Parts of Trees And Portions Of Tree Parts.

It is fundamental that decisions of the United States Court of Customs Appeals were treated by its successor, the United States Court of Customs and Patent Appeals, as binding precedents in recognition of the doctrine of stare decisis. See United States v. Charles H. Demarest, Inc., 45 CCPA 109, C.A.D. 682 (1958).

The Federal Circuit was established on October 1, 1982, by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. In South Corporation and Seal Fleet, Inc. v. United States, 690 F.2d 1368 (Fed. Cir. 1982), the court held that the holdings of its predecessors, the United States Court of Claims and The United States Court of Customs and Patent Appeals, would be binding as precedent in the Federal Circuit. The goal expressed by

the Federal Circuit was to continue

> the stability in those areas of law previously within the jurisdiction of our predecessor courts. That jurisprudence was established in great part by judges now members of this court. The public and the bar have presumably structured their legal affairs in accordance with that jurisprudence. To abandon it at this stage would be to cast the court, the public, and bar adrift on a sea of uncertainty.

Id. at 1371.

Implicit in the Federal Circuit's decision was recognition of the importance of the doctrine of stare decisis, whereby courts follow their previous decisions and are reluctant to disturb settled issues:

> For every panel of judges of this court to examine anew every issue presented would be a practice devoid of counterbalancing advantage. Such an alternative, "start from scratch" approach would entail years of delay in constructing a body of law worthy of description as the law of the circuit. We choose therefore to begin on a readily available and clearly identifiable base, maintaining at the same time a

> controlled capacity for change when change is compelled.

Id. at 1370.

In Larzelere & Co., the Court of Customs Appeals laid down the rule of statutory construction that "an unqualified provision for a given article includes such named article made by artificial means." Absent a showing of clear error, Larzelere & Co. is a precedent binding on the Federal Circuit with respect to the issue of whether the provisions for logs and flitches in headnote 1(a) include logs and flitches made by artificial means.

The Federal Circuit made no reference to Larzelere & Co. or any clear error that it may have perceived therein. However, the court did make findings which cannot be reconciled with the Larzelere & Co. rule when it held that the scope of logs and flitches is necessarily limited to the

meanings of those terms as defined in dictionaries and other glossary references, which definitions do not specifically include logs and flitches made by artificial means.

In Joseph Weiss Co. Inc., supra, the parties stipulated that "corundum is crude aluminum oxide as found in nature", and yet it was held that the tariff provision for corundum, being unqualified, included both natural and artificial corundum under the "rule of the Larzelere & Co. case."

In declining to acknowledge the binding effect of Larzelere & Co. in this case, in reliance upon which the petitioner has structured its legal affairs, the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II. In Conflict With This Court's Holdings, The Federal Circuit Has Reversed Findings Of Fact Without Reviewing The Complete Record Upon Which Those Findings Were Based.

Questions of fact herein are reviewable by the Federal Circuit under the clearly erroneous standard. Permagrain Products, Inc. v. United States, 791 F.2d 914 (Fed.Cir.1986). Findings of fact of the Court of International Trade shall not be set aside by the Federal Circuit unless they are clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure; Rule 52(a), Rules of the United States Court of International Trade.

Essential to any valid determination that any findings of fact by the trial court are clearly erroneous is examination by the reviewing court of the entire evidentiary

record which was before the fact finder. This Court held in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 at 499, 194 S.Ct. 1949 at 1959 (1984) that

> our seminal decision on the Rule [Rule 52(a)] expressly contemplated a review of the entire record, stating that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., supra, 333 U.S., at 395, 68 S.Ct., at 542 (emphasis supplied).

In holding that the factual findings of the Court of International Trade that the Brookline block fits within the scope of the tariff terms logs and flitches as found in headnote 1(a) were clearly erroneous, (App.at 25a,26a)the Federal Circuit did not, as "contemplated" by this Court, review the entire evidentiary record on appeal.

Specifically, it did not examine, among other things, the "trade publications and company brochures" referred to in its opinion (App. at 11a) which were part of the evidentiary record below.[1]

Bose Corp. and United States Gypsum Co. are binding on the Federal Circuit and strict adherence by the Federal Circuit to the rule of entire evidence review is crucial to its serving effectively as an appellate forum, for resolving the wide range of disputes within its jurisdiction.

III. The Failure To Follow Binding Precedent Is An Error So Fundamental That It Should Be Corrected By This Court Which Alone Has The

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[1] There is nothing in the record which reflects the Federal Circuit's reason for incorrectly stating, without subsequent correction, that its findings were based "[u]pon examination of the complete record and decisions below" (App. at 3a).

Power To Do So.

The established role of precedent is the outgrowth of the doctrine of stare decisis. Whenever "a court has in one case decided a question of law it will in subsequent cases in which the same question of law arises ordinarily decide it in the same way. The doctrine...is applicable although the parties in the later action are different from those in the prior actions." Department of Energy v. Westland, 565 F.2d at 689 [Quoting RESTATEMENT OF JUDGMENTS, S 70, Comment a (1942)]. Only a court sitting en banc is not bound by prior opinions and has the power and right in appropriate cases to overrule panel opinions. One panel of a court of appeals may overrule an earlier decision of another panel squarely on point only if there is an intervening and overriding decision of this

Court. White v. Estelle, 720 F.2d 415, 417 (5th Cir. 1983).

Stare decisis is especially significant in cases involving statutory construction because Congress is free to correct any error made by the courts. "Until it does, the bar and the public are justified in expecting the courts, except in the most egregious cases, neither to depart from previous interpretations of statutes, nor to give them a grudging application." Fast v. School District of City of Ladue, 728 F.2d 1030, 1034 (8th Cir. 1984). The Federal Circuit decision, which fails to follow its precedent and departs from the rule laid down in the Larzelere & Co. case that "an unqualified provision for a given article includes such named article made by artificial means", is contrary to these well founded judicial principles. The

discordant result is particularly inexplicable in light of the fact that the Federal Circuit has frequently noted the importance of precedent. Significantly, in Elbe Product Corp. v. United States, 846 F.2d 743 (Fed. Cir. 1988) a very recent decision of the Federal Circuit involving statutory interpretation, the court refused to accept the Government's contention as to the meaning of

> headnote 4(b) because it conflicts with the decision of our predecessor court, the Court of Customs and Patent Appeals, in United States v. Elbe Products Corp., 655 F.2d 1107, 1111, 68 CCPA 72 (1981) (Elbe I).
>
> ....
>
> The Government attempts to disparage and downgrade Elbe I, but that precedent is binding on this panel and we are not free to overrule or bypass it.

Id. at 744-745.

In Moragne v. States Marine Lines, Inc., 398 U.S. 375(1970), this Court expressed similar views when, before it overruled an 1886 decision, it examined the policy behind the doctrine of stare decisis. In discussing the reasons for following past decisions, the Court stated:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering a fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.

Id. at 403.

All of the factors noted by this Court as reasons for following precedent are clearly relevant to this case, and the additional fact that the Court of International Trade and the Federal Circuit have exclusive jurisdiction in all cases involving the substantive law in question necessarily means that only this Court is in the position to correct the error reflected in this case.

CONCLUSION

The judgment of the Federal Circuit in this case cannot be reconciled with the precedents established by the court of Customs Appeals in Larzelere & Co. and by the Supreme Court in United States Gypsum Co. Inasmuch as the Federal Circuit has exclusive jurisdiction of the cases which

involve the substantive law in question, this petition should be granted, because only this Court can correct an error made by the Federal Circuit.

It is respectfully submitted that the errors reflected in the decision of the Federal Circuit are so clear and fundamental that they should not be permitted to stand, and that it would be appropriate for this Court to consider summary disposition on the merits in favor of the petitioner.

Respectfully submitted,

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September 5, 1988

APPENDIX

APPENDIX A

(Appeal No. 87-1379)

BROOKSIDE VENEERS, LTD.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

Charles P. Deem, Stedina and Deem, of New York, New York, argued for plaintiff-appellee.

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Department of Justice, of Washington D.C.., argued for defendant-appellant.

With him on the brief were Richard K. Willard, Assistant Attorney General, David M. Cohen, Director and Saul Davis.

Appealed from: U.S. Court of International Trade.

Judge CARMAN.

(Decided May 11, 1988)

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL DISTRICT

(Appeal No. 87-1379)

BROOKSIDE VENEERS, LTD.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

DECIDED: May 11, 1988

Before MARKEY, Chief Judge, SKELTON and BALDWIN, Senior Circuit Judges.

BALDWIN, Senior Circuit Judge.

The United States (appellant) appeals from the judgement of the United States Court of International Trade, No. 81-9-

01305,[1] sustaining Brookside Veneers, Ltd.'s (Brookside) claim that the imported materials in question were improperly classified as "articles not specifically provided for, of wood" under item 207.00 of Schedule 2, Part 1 of the Tariff Schedules of the United States (TSUS), and were correctly classifiable as "wood veneers, other" under TSUS Schedule 2, Part 3, item 240.03. Upon examination of the complete record and decisions below, this court finds that the Court of International Trade incorrectly interpreted the relevant provisions of TSUS. We reverse.

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[1] The trial court's order denying appellants Rule 59 motion for a rehearing is published at 661 F.Supp. 620 (Ct. Int'l Trade 1987). This case has been designated a test case by the United States Court of International Trade.

Background

During 1979, 1980, and 1981, the only years at issue here, Brookside imported wood products from Italy which, at the time of entry, were invoiced as "Manmade Veneer" or "recomposed veneers". The merchandise is created by first slicing veneers from a block of natural wood. These veneers are then dyed, stacked one atop another in a predetermined sequence, glued, and bonded by cold pressing to form a solid block. New veneers are sliced from this manmade block at varying angles to obtain the final product. Thus, the resulting veneers are dyed wood and adhesive. The particular patterns cut are in response to customer requests. These manmade veneers are used in the same manner and for the same purposes as natural veneers -- e.g., in the

construction of a myriad of items, and as wall panelling.

The United States Customs Service (Customs) classified and liquidated Brookside's veneers as articles of wood, not specifically provided for under TSUS item 207.00, and assessed duties of 8%, 7.6%, and 7.3% for the years 1979,1980, and 1981, respectively. 19 U.S.C. Section 1500 et seq. (1976). After Brookside's protest under 19 U.S.C. Section 1514 and 1515 was denied, it commenced an action in the Court of International Trade seeking reclassification of the veneers under TSUS item 240.03, wood veneers, other, assessable at rates of 2%, 2% Free, and Free for 1979, 1980, and 1981,

respectively.[2]

The Court of International Trade first considered "whether Congress manifested an intent to limit the definition of wood veneers to articles derived from logs and flitches." Slip Op. at 6. The court held that the plain language of TSUS Schedule 2, Part 3, headnote 1(a) indicates a clear intent by Congress to limit wood veneers according to their source -- logs and flitches. This provision also was relied on by the court for its finding that Congress did not intend that use be a consideration in classifying wood veneers under Schedule 2, Part 3.

The court next considered whether the manmade blocks from which Brookside's

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[2] The duty on hardwood veneers was eliminated by Congress in 1980. Pub. L. No. 96-609, Section 116, 94 Stat. 3555, 3559 (codified at 19 U.S.C. Section 1202).

veneers are sliced are logs or flitches within the meaning of headnote 1(a). After reviewing standard lexicographic material, the court concluded that it is "not clear that the words log or flitch as provided b these definitions and enunciated by Congress in the provision defining wood veneers are precise and should be understood to mean a log or flitch in a natural state." Slip Op.10. The court found that log or flitch reasonably includes Brookside's manmade block because the latter possesses an "essential resemblance" to logs as referred to in headnote 1(a). The court held that Brookside had rebutted the statutory presumption of correctness accorded customs classifications, and ordered a reclassification and reliquidation under item 240.03.

Appellant argues that the trial court misapprehended the burden of proof which the statutory presumption of correctness places on Brookside. Appellant asserts that Brookside did not provide the trial court with a scintilla of factual evidence to support any of its contentions, and therefore the trial court erred in finding that Brookside successfully rebutted that presumption. The statutory presumption of correctness is explicitly stated in 28 U.S.C. S 2639(a)(1):

> [I]n any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.[3]

---

[3] This presumption did not, as appellant suggests, require Brookside to demonstrate that Customs classification

Appellant asserts that the trial court misapprehended Brookside's burden in overcoming this presumption because Brookside presented no lexicographic, legal, or other authority which suggests that the terms log and flitch can be defined to include Brookside's manmade blocks. Appellant argues further that the processing which Brookside's manmade blocks have undergone places them outside the definitions of log and flitch. Lastly,

---

was wrong because Brookside's proposed classification was correct. See Jarvis Clark Co. v. United States, 733 F.2d 873 (Fed. Cir. 1984). While this court recognized that "the best proof that a customs classification is wrong is proof that a different classification is right," Jarvis Clark, Co. v. United States, 739 F.2d 628, 630 (Fed. Cir. 1984), if we were to hold that a plaintiff in a customs classification case is required to demonstrate that the original classification was incorrect because the proposed classification is correct we would be resurrecting the dual burden of proof.

appellant claims headnote (1) is a clear legislative expression that veneers such as Brookside's, and the blocks from which they are cut, are outside the scope of item 240.03.

In opposition, Brookside argues that the stipulation of facts in lieu of trial included sufficient evidence, in the form of trade publications and company brochures, to support the trial court's conclusion. Brookside contends that the treatment of wood veneers under prior tariff schedules supports the conclusion that Congress intended to include under item 240.03 products which are commercially considered and used as wood veneer. Brookside also urges that commercial and use definitions, as well as legislation subsequent to the enactment of the items in question, dictate the result reached by the

trial court. Finally, Brookside suggests that the definitions of log and flitch would create anomalous results if read to restrict those terms to their natural state. Instead, Brookside urges us to interpret log and flitch to include artificial logs and flitches.

OPINION

It is settled that the meaning of tariff terms is a question of law, while the determination of whether a particular item fits within that meaning is a question of fact. Stewart-Warner Corp. v. United States, 748 F.2d 663, 664-65 (Fed. Cir. 1984); Daw Industries, Inc. v. United States, 714 F.2d 1140, 1141-42 (Fed. Cir. 1983). In this case, we are presented with both questions. Before we can decide whether Brookside's merchandise is within item 240.03, we must first determine the

scope of the terms wood veneer, log, and flitch as they are used in item 240.03.

Wood veneers are defined in headnote 1(a) of Schedule 2, Part 3 of TSUS as:

> Wood sheets or strips, regardless of thickness, quality or intended use, produced by the slicing or rotary cutting of logs or flitches; and wood sheets, not over 1/4 inch in thickness, produced by sawing and of a type used to overlay inferior material.

It is a general rule of statutory construction that where Congress has clearly stated its intent in the language of a statute, a court should not inquire further. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Reid v. Dept. of Commerce, 793 F.2d 277, 281-82 (Fed. Cir. 1986). In the headnote 1(a) Congress explicitly limited the definition

of sliced wood veneers to those "sheets or strips" sliced from "logs or flitches." We agree with the trial court's conclusion that the use of the terms logs and flitches in headnote 1(a) was not superfluous. Rather, they were obviously inserted to limit sliced or rotary cut wood veneers under Schedule 2, Part 3 according to source. There is no disagreement that Brookside's veneers are sliced from manmade blocks, thus Brookside's veneers are subject to this limitation. However, Brookside argues that the language used in the Explanatory Notes accompanying items 240.02 through 240.06 of the tariff Commission's Tariff Classification Study (1960), does not include a reference limiting wood veneers according to source, and therefore, no such limitation exists. This assertion fails to consider the

express language of headnote 1(a). Contrary to Brookside's claims, headnote 1(a) is precisely the indication which Brookside says does not exist -- that Congress intended to limit wood veneers according to their source. We decline Brookside's invitation to look behind the plain and unequivocal language of the statute.

Headnote 1(a) also expresses Congress' intent that wood veneers not be classified according to their "intended use." Where such a clear expression of legislative intent of the definitional limitations of a tariff term exists, it is inappropriate for a court to frustrate that intent by looking to the common and commercial use of the item to obtain a definition. Toyota Motor Sales, U.S.A., Inc. v. United States, 585 F. Supp. 649, 655 (Ct. Int'l Trade

1984), aff'd on the basis of the opinion below, 753 F.2d 1061 (Fed. Cir. 1985). The limitation expressed in headnote 1(a) adequately expresses Congress' intent that, insofar as wood veneers are concerned, intended use, commercial or otherwise, is irrelevant for purposes of customs classification, and we reject Brookside's arguments to the contrary. Congress cannot be presumed to have adopted a definition of wood veneer which was reflective of the commercial uses of that product when headnote 1(a) specifically rejects "intended use" as a means for identifying wood veneer. Brookside's argument that we consider the treatment of wood veneers under prior tariff schedules is, therefore, misplaced. We hold that sliced wood veneers are limited by the language of headnote 1(a) to veneers sliced from logs

and flitches, and that the insertion of the words "regardless of * * * intended use" in headnote 1(a) constitutes sufficient evidence that Congress rejected the common meaning of wood veneer in favor of its own definition for tariff purposes.

As the trial court correctly noted, the source of wood veneer is dispositive in this case. Thus, we must consider what limitations, if any, Congress intended to place on the terms log and flitch. Neither log nor flitch is defined in Schedule 2, Part 3. In the absence of evidence to the contrary (such as that seen above), "the meaning of a tariff term is presumed to be the same as its common or dictionary meaning." Rohm & Haas Co. v. United States, 727 F.2d 1095, 1097 (Fed. Cir. 1984) quoting Bentkamp v. United States, 40 CCPA 70, 78 (1952). In addition, "tariff

terms are written for the future as well as the present," and, absent contrary legislative intent, "can be expected to encompass merchandise not known to commerce at the time of their enactment" provided the new articles bear an "essential resemblance" to the article in the statute. Standard Surplus, 667 F.2d at 1014. To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources. C.J. Tower & Sons of Buffalo, Inc. v. United States, 673 F.2d 1268, 1271 (CCPA 1982); Standard Surplus, 667 F.2d at 1013.

The government points to several authorities which define log and flitch.

Among these is the Wood Handbook, Forest Products Laboratory, Forest Service, U.S. Dept. of Agriculture, Agriculture Handbook No. 72 (1955) (Wood Handbook),[4] recognized by the trial court as the leading authoritative source in the industry. The Wood Handbook uses the following definitions:

> Log. A section of the trunk of a tree in suitable length for sawing into commercial lumber.
>
> Flitch. A portion of a log sawed on two or more sides and intended for remanufacture into lumber or sliced or sawed veneer. The term is also applied to the resulting sheets of veneer laid together in sequence of cutting.

Wood Handbook, at 485, 482. In the revised edition of the Wood Handbook, published in 1974, log is not defined, while flitch is

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[4] The 1955 edition is the edition which immediately preceded enactment of the TSUS provisions considered here.

defined in similar words with the addition that the term is used "loosely."

The 1961 edition of Webster's Third New International Dictionary (Unabridged), which was an edition in print at the time Congress was considering the TSUS, defines these terms in similar fashion:

> log: 1 a: a usu. bulky piece or length of unshaped timber; esp: a tree trunk or a length of a trunk or branch trimmed and ready for sawing and usu. over six feet long * * *.
>
> flitch: 2 a: a longitudinal section of a log; as (1): an outer slab cut off in shaping a timber (2): a thick and often specially selected length of timber for further processing (as by cutting into veneer or turning) (3): a thick cut of timber with bark on one or more edges * * *. b: a complete package of thin sheets of veneer laid together in sequence as they are sawed or sliced

* * *.

Webster's, at 1330, 871. Both definitions are substantially similar in subsequent editions as well. See, e.g., Webster's Third New International Dictionary, 1330, 871 (unabridged 1968). Id. at 1330, 871 (unabridged 1976).

It is clear from these definitions, of which Congress was presumably aware, that at the time of the enactment of the TSUS log and flitch referred to natural logs and natural flitches. Brookside argues, however, that Congress' failure to use limiting language such as "natural" precedent to "logs" and "flitches" precludes this court from defining wood veneers in such a restrictive manner. We disagree. The terms log and flitch require no qualifying language accompanying them because they present, by definition,

sufficient limitation. We would render Congress' use of these words nugatory if we rejected their definitional limits in favor of the expansive reading proposed by Brookside.

The definition of log clearly contemplates something in a more natural state. In fact, the definition of log has always been limited to tree trunks or branches before they are cut. Similarly, flitch has always been defined with reference to either a log or veneer sheets laid in sequence as they are cut. The fact that the authors of the 1974 edition of the Wood Handbook added to the definition of flitch that the term is used "loosely" does not persuade us that it can be used so loosely as to include a manmade block of dyed, cold pressed, glued veneers. There is nothing in the definition of flitch

which indicates what the "loosest" definition would include Brookside's artificial block. That part of the definition encompassing sheets of veneer laid together in sequence of cutting does not, to us, envision just any sheets of veneer put together. We read these words as recognition that flitch refers to the "portion of a [particular] log" both before and after cutting into veneers. They do not suggest that a flitch can or should include a block of veneers cold pressed for reslicing.

The trial court, in holding Customs' classification erroneous, remarked that the fact that the logs used to produce ordinary veneer undergo some processing prior to slicing would, if Brookside's veneers were excluded, require the exclusion of ordinary wood veneers from item 240.03. Slip Op. at

10. We disagree with this conclusion. The definition of logs allows for processing to the extent necessary to prepare it for further sawing or slicing. See Webster's, supra. Thus, limited processing for this purpose does not change the basic nature of the log.[5]

As noted above, whether a particular item fits within the meaning of a tariff term is a question of fact, reviewable by this court under the clearly erroneous standard. Stewart-Warner Corp., 748 F.2d at 665. A log is limited to tree parts --- either trunk or branch. Since Brookside's block

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[5]. We also reject the government's similar argument that wood veneer is not wood veneer because it has been dyed. There is nothing in the definition of wood veneer in headnote 1(a) which suggests that dyeing changes wood veneer to something else. Because Congress chose to create its own definition of wood veneer,the court is bound by the parameters set herein.

clearly is not a tree part, it cannot be said to be a log within the meaning of that term, as it is used in headnote 1(a). To the extent the trial court found that Brookside's artificial block is a log, we hold that finding to be clearly erroneous.

Our determination of the definitional limits of flitch leads to a similar outcome. The only definition of flitch which could be argued to encompass Brookside's manmade block is the one which states that flitch includes veneers "laid together in sequence" as they are sliced. However, we have determined that a flitch is limited to a portion of a log before and after slicing. Since Brookside's block is not a log, it cannot be a flitch when the latter is limited to portions of a log. Nor can it be a flitch where that term is used in a general way to refer to the

veneers, laid in sequence, of cutting, which result from the slicing of a flitch or log. To the extent the trial court found that Brookside's artificial block bears an essential resemblance to a flitch, we also hold that finding clearly erroneous.

Brookside's contention that logs and flitches can reasonably be read to include the manmade blocks which it produces because these blocks bear an "essential resemblance" to natural logs and flitches is misplaced. Brookside presented no evidence indicating that log or flitch ever referred to anything other than wood in its natural state. We think Brookside, and the trial court, read too much into these terms. It is the use of the terms "logs and flitches" which constitutes the limiting language in headnote 1(a). If

Congress had wanted to be more general in this treatment of wood veneers it could have selected terms which were not restrictive by their very nature, as are log and flitch.

Our holdings do not,as Brookside suggests, create anomalous results. Brookside states in its brief that "the parties have stipulated that Brookline veneer is used as veneer in making plywood" and "wood-veneer panels." Appellee's brief at 11. Brookside suggest that these stipulations constitute some sort of admission by appellant that plywood and wood-veneer panels made with Brookside's veneers are plywood and wood-veneer panels for tariff purposes. Thus, Brookside asserts, if Brookside's veneers are not veneers for tariff purposes, then plywood is not plywood and wood-veneer panels are

not wood-veneer panels. But Brookside misinterprets these stipulations to mean for more than they say. The stipulations to which Brookside refers say only that Brookside's veneers are "used in the same manner and for the same purposes" as natural veneer. Stipulation of Facts in Lieu of Trial pp 5 and 5(a), at 2-3. They do not say that the finished products -- plywood and wood-veneer panels -- are those products for tariff or any other purposes. Whether plywood or wood-veneer panels or any other product made with Brookside's veneers fits within other specific tariff provisions is an issue which is not before us, and therefore one which we do not decide.

We hold that Brookside's veneers are not veneers within the meaning of headnote 1(a), and that the manmade blocks from

which they are cut are neither logs nor flitches. we reverse the decision of the Court of International Trade holding Brookside successful in its rebuttal of the statutory presumption of correctness accorded customs classifications and ordering a reclassification under item 240.03, and reinstate the classification ordered by Customs.

REVERSED

APPENDIX B

Slip Op. 86 - 142

UNITED STATES COURT OF INTERNATIONAL TRADE

BROOKSIDE VENEERS, LTD.,

Plaintiffs,

v.

UNITED STATES,

Defendants.

BEFORE: CARMAN, JUDGE

Court No. 81-9-01305

MEMORANDUM OPINION AND ORDER

[Judgment for Plaintiff.]

Decided: December 30, 1986.

Stedina and Deem (Charles P. Deem) for the plaintiff.

Richard K. Willard, Assistant Attorney General, Joseph I. Liebman, Attorney in Charge, International Trade Field Office, (Saul Davis) Department of Justice, Civil Division, Commercial Litigation Branch for the defendant.

CARMAN, JUDGE: Plaintiff challenges the United States Customs Service (Customs) classification of certain wood products involved as manmade veneers and marketed as Brookline veneers under item 207.00 of the Tariff Schedules of the United States (TSUS) as articles of wood, not specially provided for.

The merchandise in question was manufactured in and exported from Italy to New York in 1979, 1980, and 1981. It

consists of veneers sliced from a block of natural wood veneers which are dyed,[1] glued, bonded, and cold pressed together. The formation and slicing of the block allows for a particular color, grain, and pattern[2] of the final product depending upon the customer's requirements. The merchandise is used in the same manner and for the same purposes as natural veneers and some plastics materials.[3] It was not

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[1] Plaintiff utilizes an infinite variety of colors, some of which do not appear in any known natural tree, log, or flitch from which natural wood veneers are sliced.

[2] Depending upon the angle at which the block is sliced, various patterns are created.

[3] The merchandise is used in the construction and manufacture of buildings, furniture, fittings, doors, window frames, wall-paneling, musical instruments, audio speakers, boats, tennis rackets, etc. It is also used in the manufacture of products commonly and commercially known as wood veneer panels.

known in commerce at the time of enactment of the TSUS.

The imported articles were assessed with duty under TSUS Schedule 2, Part 3 in the following manner:

	1979	1980	1981
207.00 Articles not specially provided for, of wood	.8%	7.6%	7.3%

The plaintiff contends that the merchandise should have been classified and assessed with duty in accordance with item 240.03 and definitions therein:

Part 3 headnotes:

> 1. For the purposes of this part, the following terms have the meanings hereby assigned to them:
>
> (a) Wood veneers: Wood sheets or strips, regardless of thickness, quality or intended use, produced by the slicing or rotary cutting of logs or flitches; and wood sheets, not over 1/4 inch in thickness, produced by sawing and of a type used to overlay inferior material;
>
> . . . .
>
> Wood veneers, whether or not face finished, including wood veneers

reinforced or backed with paper, cloth, or other flexible material:

Not reinforced or backed:

. . . .

		1979	1980	1981
240.03	Other.	.2%	2%	Free Free[4]

The question presented for decision is whether the imported materials were properly classified by Customs as articles of wood not specially provided for. The Court disagrees with the classification by Customs and holds that plaintiff's

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[4] By an amendment to Schedule 2, Part 3, the duty on hardwood veneers, items 240.00-240.06,was eliminated. See Act of Dec. 28, 1980, Pub. L. No. 96-609, S 116, 94 Stat. 3555, 3559 (codified at 19 U.S.C. S 1202). The purpose of the amendment was to "enable U.S. manufacturers of plywood, who rely on imported logs and veneers for the manufacture of their product to obtain veneers at a lower cost and thus complete more effectively with imported plywood." S. REP. NO. 999, 96th Cong., 2nd Sess. 19 (1980).

merchandise should have been classified as wood veneers.

Plaintiff's Contentions

Plaintiff contends that Brookline veneers, in accordance with usage and common and commercial meaning should be classified as wood veneers. Plaintiff urges the source of veneers has never been an important component in the classification of veneers. Assuming source an important factor, however, plaintiff disagrees with the meaning ascribed to the terms log and flitch by the defendant in the tariff provision for wood veneers. More specifically, plaintiff contends that the words log and flitch lack sufficient precision to enable the exclusion from classification as wood veneers of plaintiff's merchandise. Plaintiff asserts the defendant has erroneously interpreted

the tariff provision to require the words "only natural" before "log and flitch" thus compelling the conclusion that plaintiff's reconstructed Brookline veneers are not wood veneers. Plaintiff further argues the terms log and flitch are capable of including articles made by artificial means.

Defendant's Contentions

In opposition, defendant argues Congress explicitly provided that the use of the product is irrelevant in the determination of whether or not an article is classifiable as wood veneer. Defendant further contends that common and commercial meaning are irrelevant, since by defining the term wood veneers and not altering this definition in a subsequent amendment, Congress evinced an intent to limit the scope of the term to its literal elements.

One of these elements, defendant maintains, is source-log or flitch. Defendant asserts that the block from which Brookline veneers are sliced is neither a log not a flitch as these terms are defined and understood; and therefore, plaintiff's merchandise cannot be classified as wood veneers.

Discussion

The rules of statutory construction provide that a statute must be construed in accordance with legislative intent. If this intent is clear from the language of the statute, no further inquiry is needed. United States v. Esso Standard Oil Co., 42 CCPA 144, 151 C.A.D. 587 (1955). If the intent is not apparent, the Court will consider legislative history United States v. Kung Chen Fur Corporation, 38 CCPA 107, 117, C.A.D. 447 (1951); long established administrative practice Commonwealth Oil

Refining Co. v. United States, 60 CCPA 162, 174, C.A.D. 1105, 480 F.2d 1352, 1361 (1973); judicial decisions on the issue at or closely following the time enactment Merry Mary Fabrica, Inc. v. United States, 1 CIT 13 (1980); the commercial or common meanings of the terms in the statute when the statute is enacted Armand Schwab & Co., Inc. v. United States, 32 CCPA 129, 132 C.A.D. 296 (1945). It is also a fundamental rule that a Customs classification, once determined, is entitled to a presumption of correctness. Ameliotex, Inc. v. United States, 426 F. Supp. 556, 563 (1976), aff'd, 65 CCPA 22, C.A.D. 1200, 565 F.2d 674 (1977).

At issue is whether Congress manifested an intent to limit the definition of wood veneers to articles derived from logs or flitches; and if so, whether such logs or

flitches must exist in their natural state. The definition of wood veneers as previously stated provides as follows:

> Wood sheets or strips, regardless of thickness, quality or intended use, produced by the slicing or rotary cutting of logs or flitches; and wood sheets, not over 1/4 inch in thickness, produced by sawing and of a type used to overlay inferior material.

TSUS Schedule 2, Part 3, headnote 1(a)

Plaintiff suggests that prior to the enactment of the TSUS source was not a significant factor in the classification of veneers. Defendant contends that references were not made to source since logs and flitches were universally recognized as the source of wood veneers. Veneer has been defined as:

> **1a:** a thin sheet of wood cut or sawed from a log and adapted for adherence to a smooth surface (as of wood)...as (1): a layer of wood of superior value or excellent grain for overlaying an inferior wood (as in cabinetmaking) usu. by gluing (2): any one of the thin layers that are glued or

> otherwise bonded together to form plywood **b:** material (as sheets of wood) for veneering; sometimes: thin highly glazed colored paperboard for such use **2:** something felt to resemble or functioning in the manner of a veneer of wood esp. in forming a superficial layer: as **a:** a superficial or meretricious show: GLOSS **b:** a protective or ornamental facing (as of brick or stone) for a wall **c**(1): a thin but extensive covering of an older geologic formation or surface...[emphasis added].

Webster's Third New International Dictionary (1968). The leading authoritative lexicographic source in the industry as it appeared in the edition that immediately preceded the enactment of the TSUS also provides a definition:

> Veneer. A thin layer or sheet of wood cut on a veneer machine.
> Rotary-cut veneer. Veneer cut in a lathe which rotates a log or bolt, chucked in the center, against a knife.
>
> Sawed veneer. Veneer produced by sawing.
> Sliced veneer. Veneer that is sliced off a log, bolt, or flitch with a knife.
> [Emphasis added.]

Forest Products Laboratory, Forest Service, U.S. Dep't of Agriculture, Agriculture Handbook No. 72, Wood Handbook 490 (1955) (hereinafter cited as Wood Handbook).

Despite plaintiff's contention, the Court is guided by the plain language of the above definitions and the TSUS which explicitly refer to source. The language of the TSUS expressly provides that at least with regard to slicing and rotary cutting, the material from which the veneers are derived must be a log or flitch. Presumably, reference was made to source since Congress understood wood veneers to mean wood veneers derived from wood or wood products rather than some other material. Absent strong evidence to the contrary, we are simply unable to conclude that the words log and flitch are superfluous. See Ameliotex, 65 CCPA at 25,

565 F.2d at 677 ("Congress is presumed not to have used superfluous words in a statute"). In accordance with this language, we are also satisfied that Congress did not intend the usage of the article to be considered in ascertaining whether the merchandise is classifiable as wood veneers.

It does not necessarily follow, however, that Congress by enacting Pub. L. 96-609,[5] which eliminated the duty on hardwood veneers, intended to exclude articles such as plaintiff's merchandise from the scope of the wood veneer provision. There is nothing in the record to suggest that Congress was even remotely aware and thus approved of Customs' classification of the imported articles. No plausible

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[5] See supra note 4.

justification for the distinction, moreover, is apparent.

The analysis therefore focuses upon and underscores the importance of the meaning ascribed to the terms log and flitch in the definition of wood veneers. The issue is whether the block from which Brookline veneers are sliced, in its artificial state, can be treated as a log or flitch consonant with the statutory definition of wood veneers. In defining wood veneers, Congress has not provided definitions for either log or flitch.

In the absence of definition, Congress is presumed to attach the common meaning of a term in a tariff provision. Schott Optical Glass, Inc. v. United States, 67 CCPA 32, 34, C.A.D. 1239, 612 F.2d 1283, 1285 (1979). To interpret the term, the Court may rely upon its own understanding of the

term and may refer to the works of standard lexicographers, scientific authorities, and the testimony of witnesses. United States v. Standard Surplus Sales, Inc., 69 CCPA 34, 37-8, 667 F.2d 1011, 1013 (1981). Of additional import is TSUS General Rule of Interpretation 10(c) which provides that an imported article described in two or more provisions is classifiable under the provisions which more specifically describes it, bearing in mind that tariff schedules are drafted for the future as well as the present and embrace terms not known at the time of enactment. Standard Surplus Sales, 69 CCPA at 38, 667 F.2d at 1014.

Plaintiff contends that the common and commercial understanding of the terms log and flitch are not precise; and therefore, it is inappropriate to exclude plaintiff's

block or reconstructed logs from that meaning. Plaintiff offers evidence from an article written by its President, Arne Thomsson, to support this contention. In discussing the uses of a lathe and slicer to produce wood veneers, Mr. Thomsson states that a log is processed by steaming, cooking, and drying before used to produce ordinary wood veneers.

Defendant directs the Court to consider the definitions of log and flitch as found in the Wood Handbook. The Handbook defines log and flitch as follows:

> Log.-- A section of the trunk of a tree in suitable length for sawing into commercial lumber.
>
> Flitch. A portion of a log sawed on two or more sides and intended for remanufacture into lumber or sliced or sawed veneer. The term is also applied to the resulting sheets of veneer laid together in sequence of cutting.

Wood Handbook, supra, at 485, 482. In the 1974 revised edition of this book, log is not defined. Flitch is defined in essentially the same manner as above, but the authors state that the term is loosely used.

Defendant asserts that the dyed, bonded, glued, and cold pressed sheets are not comprised within the Handbook's description of log or the first definition of flitch. Defendant also maintains that the second definition of flitch is limited to sheets immediately after removal from the log and placed together in sequence of cutting. This definition, defendant suggests, encompasses no further processing, such as that experienced during the production of Brookline veneers.

It is nevertheless not clear that the words log or flitch as provided by these

definitions and enunciated by Congress in the provision defining wood veneers are precise and should be understood to mean log or flitch in a natural state. As Mr. Thomsson's article appears to show, even the log used to produce ordinary wood veneers undergoes some processing thus transforming the article somewhat from its "natural" state. If we were to adopt defendant's reasoning, even ordinary wood veneers produced from these logs would be excluded from the classification of wood veneers.

Simple logic, however, dictates a different result. Tariff terms must be construed to avoid absurd or anomalous results. 2 R. Sturm, Customs Law & Administration S 51.4, at 29 (3d ed. 1986). Tariff terms thus encompass articles not known at the time of enactment if the new

article possesses an essential resemblance to the one referred to in the statute. Standard Surplus Sales, 69 CCPA at 38, 667 F.2d at 1014 (1981); FAG Bearings, Ltd. v. United States, 9 CIT ___, Slip Op. 85-52 (1985). An unqualified provision for an article includes those made by artificial means in the absence of contrary legislative intent or administrative practice. Joseph Weiss Co., Inc. v. United States, 31 Cust. Ct. 17,19, C.D. 1539 (1953).

Defendant has not shown an intent to require the use of a natural log or flitch in composing veneers. Rather, defendant draws a comparison between MICRO=LAM (a registered trademark) and the block from which Brookline veneers are sliced. Since MICRO=LAM is an end product used for structural wood veneers, the relevance of

this comparison is unclear. Unlike MICRO=LAM, the Brookline block is used in the manufacture of wood veneers. Plaintiff's veneers are made by an advanced process and are state of the art within the industry. The character of the veneers which are sliced from the block, but for the detail and color of the product, does not differ from that of ordinary veneer.

Plaintiff has therefore successfully rebutted the presumption of correctness afforded Customs' classifications and persuaded us that log and flitch need not exist in a natural state. This result seems consistent with apparent Congressional intent to draw terms for the future encompassing articles not technologically feasible or otherwise unavailable at the time of enactment. Had Brookline veneers been known at the time of

enactment of the TSUS, presumably Congress would have classified them as wood veneers. Therefore, plaintiff's merchandise was improperly classified as "articles not specially provided for, of wood," since there is a more specific provision for classification of them. Plaintiff's articles should be reclassified and reliquidated under TSUS Item 240.03 providing for the classification of wood veneers - other.

SO ORDERED.

Gregory W. Carman, Judge

Dated: December 30, 1986

New York, New York

March 26, 1987

Slip Op. 87- 33

UNITED STATES COURT OF INTERNATIONAL TRADE

BROOKSIDE VENEERS, LTD.,

Plaintiff,

v.

UNITED STATES,

Defendant.

BEFORE: CARMAN, JUDGE

Court No. 81-9-01305

(Defendant's motion for rehearing denied.)

Decided: March 26, 1987

Stedina and Deem (Charles P. Deem on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General, Joseph I. Liebman, Attorney in Charge, International Trade Office, U.S. Department of Justice, Civil Division,

Commercial Litigation Branch (Saul Davis on the motion) for the defendant.

MEMORANDUM OPINION AND ORDER

CARMAN, JUDGE: Defendant, United States, pursuant to Rule 59 of the Rules of this Court, moves for a rehearing of this Court's opinion and judgement in Slip Op. 86-142 of December 30, 1986. While the purpose of a rehearing is not to retry a case, if there has been a fundamental and significant flaw in the conduct of the original proceedings, Rule 59 provides a useful remedy. See W.J. Byrnes & Co. v. United States, 68 Cust. Ct. 358, C.R.D. 72-5 (1972).

Defendant contends the Court misconstrued the terms "log or flitch" as used but not defined in the Tariff Schedules of the United States (TSUS). The Court permitted

oral argument of the motion to ensure clarity of the issues presented.

Defendant urges there is little or no case law defining the terms log or flitch. It claims the use of a reconstructed, artificial log or a block of wood is not the same as a log or flitch in its natural state. Furthermore, to rule that a reconstructed log is a log or flitch might result in disassembling other provisions of the TSUS. Defendant asserts that should the Court uphold its earlier judgment, even Formica could be considered wood veneer.

Plaintiff contends that Congress did not define the words log or flitch. The Court should therefore look to the common and commercial meanings of the terms. Furthermore, urges plaintiff, it is incomprehensible that Congress could have intended its Brookline veneers to be treated as anything other than wood veneers

under TSUS, item 240.06. Such a result would present an anomaly.

Flitch is defined as follows:

> **1a** obs: the side of any meat animal salted and cured **b:** a side of pork cured and smoked; often: the side meat of a hog after removal of shoulder loin, ham. and bones cured and smoked bacon **c:** a strip or steak of fish (as halibut) suitable for or prepared by smoking **2a:** a longitudinal section of a log: as (1): an outer slab cut off in shaping a timber (2): a thick and often specially selected length of timber for further processing (as by cutting into veneer or turning) (3): a thick cut of timber with bark on one or more edges (4): a lengthwise half of a balk **b:** a complete package of thin sheets of veneer laid together in sequence as they are sawed or sliced. **3:** one of several elements (as planks or iron plates) that are secured together side by side to make a large girder or laminated beam

Webster's Third New International Dictionary 871 (1968) (emphasis added). The Wood Handbook further provides:

> Flitch. Portion of a log sawed on two or more sides

> and intended for remanufacture into lumber or sliced or sawed veneer. The term is also applied to the resulting sheets of veneer laid together in sequence of cutting.

Forest Products Laboratory, Forest Service, U.S. Dep't of Agriculture, Agriculture Handbook No. 72, Wood Handbook 482 (1955). The Court finds that where a log or flitch is essentially in its raw state, the veneer manufactured therefrom are properly classifiable as wood veneers under TSUS items 240.00 - 240.06.

Both plaintiff and defendant acknowledge that certain processing must occur before a tree can be processed into ordinary wood veneers. The tree must certainly be felled. It must be cut, and the logs and flitches resulting therefrom may be subject to steaming, cooking, and drying. The Court finds that the placing together of veneers or other types of

flitches to secure a certain pattern, the gluing, and sometimes dyeing, by the plaintiff did not transform the resulting logs or flitches from their basic raw state. They are still logs or flitches. If processing of the logs or flitches advances further, the Court observes the raw material, i.e, the logs or flitches may reach a point where they will no longer be logs or flitches but rather some other intermediate or final product.

Since the defendant has failed to establish that there was a fundamental or significant flaw in the conduct of the original proceedings, defendant's motion for a rehearing, pursuant to Rule 59, is denied.

_____

Gregory W. Carman, Judge

Dated: New York, New York
March 26, 1987

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: HON. GREGORY W. CARMAN, JUDGE

BROOKSIDE VENEERS, LTD.,

Plaintiffs,

v.

UNITED STATES,

Defendants.

Court No. 81-9-01305

O R D E R

Upon consideration of defendant's motion for rehearing pursuant to Rule 59 of the Rules of this Court, upon hearing from respective counsel, and upon all other papers and proceedings herein, it is hereby

ORDERED, that defendant's motion for rehearing is denied.

_____

Gregory W. Carman, Judge

Dated: New York, New York

This 26 day of March, 1987.

APPENDIX C

Tariff Schedules of the United States, Schedule 2, Part 1 and Part 3.

Part 1. - WOOD AND WOOD PRODUCTS

Subpart F. - Articles Not Specially Provided For, of Wood

ITEM	ARTICLES
207.00	Articles not specially provided for, of wood

Part 3. - WOOD VENEERS, PLYWOOD AND OTHER WOOD-VENEER ASSEMBLIES, AND BUILDING BOARDS

Part 3 headnotes:

1. For the purposes of this part, the following terms have the meanings hereby assigned to them:

(a) Wood veneers: Wood sheets or strips, regardless of thickness, quality or intended use, produced by the slicing or rotary cutting of logs or flitches; and wood sheets, not over 1/4 inch in thickness, produced by sawing and of a type used to overlay inferior material;

ITEM	ARTICLES
	Wood veneers, whether or not face finished, including wood veneers reinforced or backed with paper, cloth, or other flexible material:
240.03	Other

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL DISTRICT

(Appeal No. 87-1379)

BROOKSIDE VENEERS, LTD.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

DECIDED: May 11, 1988

Before MARKEY, Chief Judge, SKELTON and BALDWIN, Senior Circuit Judges.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT:

_____
Francis x. Gindhart, Clerk

6/9/88
_____
Date

cc: Mr. Saul Davis, DOJ
Mr. Charles P. Deem

FILED

U.S. COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

June 9, 1988

FRANCIS X. GINDHART
CLERK